IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-788

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, and SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners,*

v.

OLIVER I. SABALA, Individually and on Behalf of All Others Similarly Situated, and LEONARD M. RAMIREZ, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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ERRATA

On page 13, first line of the first full paragraph, substitute the word "gainsaid" for the words "again said" ahead of the word "that".

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 516 F.2d 1251, and is reproduced in the Appendix to the Petition for Certiorari (App. pp. A-51-90).

The Opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 362 F.Supp. 1142; and the Remedial Order is reported at 371 F. Supp. 385. Both are reproduced in the Appendix to the Petition for Certiorari (App. pp. A-1-50).

JURISDICTION

While Respondents do not question the jurisdiction of this Court as set forth in the Petition, we note that Western Gillette, Inc., an Appellant below, whose interest will be greatly effected by a grant of Certiorari, has filed a petition for a rehearing and a suggestion for a rehearing *en banc* with the United States Court of Appeals for the Fifth Circuit; the petition and suggestion are presently pending before that Court.

QUESTIONS PRESENTED

The Petitioners set forth no questions assertedly presented by the Petition. The statement of the case and the Petitioner's argument in fact indicate the questions are as follows:

1

Whether a Labor Union violates 42 U.S.C. § 1981 by establishing and continuing a seniority system which gives present effect to past discriminatory practices?

2

Whether, given a finding that a Seniority System, neutral on its face, operates to freeze the status quo of prior discriminatory employment practices, 42 U.S.C.

§ 1981 empowers a Federal District Court to order the relief necessary to eliminate the present effect of past discriminatory practices?

3

Whether the International Brotherhood of Teamsters' failure to take those precautions necessary to assure equality of employment opportunities to its minority members violates 42 U.S.C. § 1981?

STATEMENT OF THE CASE

The Petitioner asserts that this case is, in all important respects, identical to *International Brotherhood of Teamsters v. United States* (No. 75-636), and *Southern Conference of Teamsters v. Rodriguez* (No. 75-715). Respondents have not been furnished with copies of the Petitions for Certiorari filed in the foregoing cases, nor are they acquainted with the records in those cases. They are however, intimately aware of the record in the instant case.

After twenty-two days of bifurcated trial during which testimony was taken from thirty-three witnesses including seventeen of the twenty-three class members, seven officers or employees of the company[1] and six officers or agents of the various Union defendants, the District Court held, *inter alia*, that all three Union defendants were responsible by commission and omission for "locking" the class members into the less desirable city driver jobs at the company's terminal in Houston, Texas. The assignment of responsibility was bottomed on the proposition that

1. Western Gillette, Inc.

the Union defendants knew[2] that separate city and road driver classifications, as the Union *interprets*[3] that con-

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2. At trial, the Court examined Mr. Donald E. Cantley, President of the Company;

Q. What have you done to try to elleviate that situation and what did you do in your negotiating with the Union? *I assume the Union must have the same knowledge as you about the problem.* Do you think so?

A. *They're very much aware of the problem.* (Emphasis supplied)

R. pp. 1127-1128 (Reference will be made throughout to the Record on Appeal by "R" followed by the page numbers.)

3. Mr. Billy Lacy, called by the Company, acknowledged that nowhere in the contract is forfeiture of seniority on transfer from city to road provided for, *viz*:

Q. (By Mr. Rosenblum) But does it say anywhere—I'm still rather confused. I appreciate that there must be terminal seniority, but does it say anywhere that if a man transfer from city to road, he must resign and start at the bottom of the road seniority roster? A. If your question is, is there language that states this, no, there is not language that states this. No.

R. pp. 864-865.

Q. (By Mr. Rosenblum) Just for the record, Mr. Lacy, then, it is true that the contract, in addition to not providing the transfer language, also does not require two seniority rosters be kept? There is no requirement that two seniority rosters be kept? A. There is no language in the contract that states that two seniority rosters must be kept—

Q. Okay. A. —as such.

Q. And as to reasons for two rosters, would you agree that a decision was made that separate bargaining units required this sort of transfer policy and the maintenance of two rosters—that is, your company, and I must conclude, the union, by common enterprise, have decided this? Would you—or do you have knowledge of that? A. Well, I suppose it was arrived at many years ago like that, yes.

Q. And as to the membership of the union locally and nationally, we have heard much reference, and I know you have been sitting here representing the company, to ratification by the membership of the union. Is the question presented to the union members that separate seniority rosters would be kept, at their ratification meetings? A. I couldn't answer that. They wouldn't let me into those meetings.

Q. When you were a road driver here in 1965, was this issue presented to you when you voted to ratify the '67 contract? A. I don't believe that it was ever brought up, to my knowledge.

R. pp. 874-875.

cept, freeze Mexican American and black city drivers into the less desirable position of city driver, and refused to either modify the National Master Freight Agreement or to square its interpretation of the contract with the requirements of the law.

Nowhere, as Petitioners assert, is the requirement of seniority forfeiture "set out" [4] or "provide[d] for" [5] in the National Master Freight Agreement, or its supplements.[6]

Petitioners assert that it is "undisputed fact" that "employees in both city and road job classifications have historically and continuously preferred this separation of road and city job bidding and lay-off seniority".[7] That simply is not the case at Houston, Texas, where this cause arose, *viz*:

> "Local No. 988 [8], under instruction of its membership, petitioned the National Bargaining Committee to merge the seniority list of city drivers and over-the-road drivers retroactively, thereby exercising all

4. See, Petition for Certiorari, p. 4.

5. *Id.*, p. 6.

6. Finally, the basic seniority issue in this issue in this case—whether a discriminatee should be allowed to transfer from city operations to LD [long distance] (and thus from one contract to another) with full carryover terminal seniority—is neither specifically prohibited nor even addressed by the contracts before the court and certainly not that of local supplements. (Citations omitted) *U.S. v. T.I.M.E.-D.C. Inc.*, 517 F.2d 299, 310-311 (5th Cir. 1975). Petition for Certiorari pending *sub nom International Brotherhood of Teamsters v. United States* (No. 75-636).

7. Petition for Certiorari, p. 7.

8. Local 988, IBT is the local union in the case *sub judice;* they too have petitioned this Court for Certiorari—saying that they are not responsible. The chorus of "not responsible" union entities is complete.

> of its available influence in favor of the seniority changes which were subsequently ordered by the District Court. The duly transmitted resolution was not concurred in." *Teamsters Freight, Tankline & Automobile Industry Employees, Local No. 988 v. Oliver I. Sabala, et al* (No. 75-781), October Term, 1975), Petition for Certiorari, p. 7

The Petitioners misconstrue the Trial Court's decision when they suggest that seniority was awarded upon the existence of "modified system seniority" and "changes of operation" within the Southern Conference.[9] The Court of Appeals for the Fifth Circuit correctly recognized that the modified seniority system effectively extends the road drivers' universe of job opportunities to the whole of the Southern Conference. It further correctly observed that the award of "rightful place" seniority to the discriminatees was predicated on factual determinations by the Trial Court that ten of the discriminatees would have accepted over-the-road employment anywhere in the Southern Conference, while thirteen would have accepted over-the-road only at the Company's Houston facilities. Modified system seniority was relied upon by the Trial Court only to define the world of job opportunities *in futuro,* while "rightful place" seniority was properly predicated upon the jobs to which each individual discriminatee would have acceded "but for" the company's original discrimination in hiring, and the unions' "lock-in" discrimination. The Circuit Court enthusiastically affirmed these remedial portions of the Order. Petition for Certiorari, App. pp. A-75 - A-77.

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9. Petition for Certiorari, p. 9.

REASONS FOR DENYING THE WRIT

1

A Labor Union Violates 42 U.S.C. §1981 By Establishing and Continuing a Seniority System Which Gives Present Effect to Past Discriminatory Practices

Recognizing that effective implementation of the Thirteenth Amendment required legislative identification of the specific civil rights protected, Congress enacted §1 of the Civil Rights Act of 1866.[10] As written, the Act clearly intended to carry out "the Amendment abolishing slavery" by doing away with "the incidents and consequences of slavery" and to "instate the freedman in full employment of that civil liberty and equality which the abolition of slavery meant". *Blyew v. United States*, 80 U.S. 581, 595, 601 (1871), dissenting opion of Justice Bradley.

While Justice Bradley recognized the fundamental purposes of the Thirteenth Amendment and its enabling legislation, he was to conclude, in a later case, that the prohibitions contained therein could constitutionally embrace only the most "fundamental rights".[11] In the *Civil*

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10. Act of April 9, 1866, Ch. 31, §1, 14 Stat. 27, Re-enacted by §17 of the Enforcement Act of 1870, Act of May 31, 1870, Ch. 114, §18, 16 Stat. 140, 144 and codified in §§1977, 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§1981, 1982.

11. *Civil Rights Cases*, 109 U.S. 3 (1883). Recognizing that Congress had the power to define and prohibit badges and incidents of slavery, Justice Bradley found that Congress could not, by its enabling legislation, adjust what he characterized as "social rights". To support this conclusion he called attention to the Civil Rights Act of 1866, and noted that "Congress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights . . ." *Id.* at 22 While Justice

Rights Cases, 109 U.S. 3 (1883), this Court was faced with the issue of whether Congress exceeded its authority under the Thirteenth Amendment in enacting §§1 and 2 of the Civil Rights Act of 1875. Justice Bradley, writing for the majority, ruled that discrimination against blacks in access to railroads, inns and theaters was not a "badge of slavery" and could not be protected by Congress under the implementing clause of the Thirteenth Amendment. This decision sparked one of the great dissents of American jurisprudence. Justice Harlan, finding that the majority opinion rested on grounds "entirely too narrow and artificial",[12] recognized that private acts of racial discrimination *are* badges of servitude which Congress has full power under the Thirteenth Amendment to correct. Anticipating the practical consequences of the Court's holding, Justice Harlan warned: "there cannot be in this Republic any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."[13]

Two decades later, this Court held that the United States did not have the constitutional power to punish individuals who deprived blacks of their freedom of contract—refusing to accept the proposition that their inability to contract was a badge of slavery. *Hodges v. United States,* 203 U.S. 1 (1906). Again, Justice Harlan dissented. Some sixty years after *Hodges,* Justice Harlan's position

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Bradley sought to narrowly define what constituted a "fundamental right" he specifically recognized that the "disability . . . to make contracts . . . [is an] inseparable incident[s] of slavery." Id. See, Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Hous. L. Rev. 2, 371 (1975).

12. *Id.* at 26.

13. *Id.* at 62.

was vindicated. *Jones v. Alfred H. Mayer Co.*, 302 U.S. 409 (1968). In *Jones*, this Court found "that §1982 operates upon the unofficial acts of private individuals whether or not sanctioned by State law . . ." *Id.* at 437;[14] and, more importantly, expressly overruled this Court's earlier holding in *Hodges, supra.*[15]

Based on this Court's finding in *Jones* that "the right to contract for employment, [is] a right secured by 42 U.S.C. §1981",[16] the lower courts have consistently found that §1981 proscribes racial discrimination in private employment. *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1971), cert. denied, 409 U.S. 982 (1972); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970) cert. denied, *sub nom, Dobbs House, Inc. v. Sanders*, 401 U.S. 948 (1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied, 404 U.S. 916 (1972); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1975), cert. denied, 400 U.S. 911 (1070); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.* 478 F.2d 979 (D.C. Cir. 1973). And in *Johnson v. Railway Express Agency*,____ U.S.____, 44 L.Ed.2d 295, 301 (1975), this Court held, *inter alia*, "that §1981 affords a federal remedy against discrimination in private employment on the basis of race".

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14. While *Jones* was an action under §1982, this Court recognized that both §1981 and §1982 had their genesis in §1 of the Civil Rights Act of 1866, *Jones, supra*, at 441, n. 78.

15. "Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled". *Id.*

16. *Id.*

On this basis, the lower Federal Courts have not hesitated to subject labor unions to the scrutiny of §1981 when the union has been charged by an aggrieved employee with impairing that employee's ability to make or enforce an employment agreement because of his race. *Young v. International Tel. & Tel. Co., supra; Guerra v. Manchester Terminal Corp.,* 498 F.2d 641 (5th Cir. 1974); *Waters v. Wisconsin Steel Works, supra; Macklin v. Spector Freight Systems, Inc., supra; Johnson v. Ryder Trucklines, Inc.,*____F.Supp.____, 10 EPD ¶10, 535 (W.D. N.C. 1975).

Thus, the question then becomes whether a labor union which knowingly[17] establishes a seniority system that perpetuates the past discriminatory practices of an employer has impaired the employee's ability to contract for employment. The lower Courts have consistently answered this question in the affirmative. *Guerra, supra; Johnson v. Ryder Trucklines, Inc., supra.* These holdings are necessarily founded upon a judicial recognition that the employee-union relationship is a critical link in the chain of the employee-employer contract. *James v. Ogilvie,* 310 F. Supp. 661 (D.C. Ill. 1970); *Dobbins v. International Brotherhood of Electrical Workers,* 292 F. Supp. 413 (D.C. Ohio 1968). ". . . the acts of the Union . . . impair plaintiffs right to make and enforce contracts within the meaning of 42 U.S.C. §1981". *Gray v. Bartenders Union,* ____F. Supp.____, 10 FEP Cases 496, 498 (N.D. Cal. 1975).

In this case, based upon the extensive record before it, the Trial Court held that the dual seniority system as interpreted and applied by the Union, locked in past discrimination because it discouraged minority employees

17. See, n. 2, supra.

from transferring from the less desirable city driver positions to the more desirable road positions from which they had been previously excluded because of their race.[18]

But for the Company's original discrimination, Respondents would have been over-the-road drivers in the past; and, but for the Union's interpretation of the contract which it negotiated requiring that a city driver forfeit his accumulated job seniority on transfer to a different classification, Respondents could become over-the-road drivers today. The implication is obvious. Because of the interpretations placed on the collective bargaining agreement by the Petitioners, Respondents are in no better position today than they were yesterday to contract for those jobs which were formerly denied to them because of their race. See, *e.g., Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 235 (10th Cir. 1970), cert denied, 401 U.S. 954 (1971).

Accordingly, Respondents submit that Petitioners have not presented a substantial question of law which merits review by this Court.

2

When a District Court Finds That a Seniority System, Neutral on Its Face, Operates to Perpetuate Past Discriminatory Employment Practises, That Court is Empowered By 42 U.S.C. §1981 to Order the Relief Necessary to Eliminate the Present Effect of the Past Discriminatory Practices

Unless a statute in so many words, or by necessary inescapable inference, restricts the Court's jurisdic-

18. Petition for Certiorari, App. pp. A-20 - A-21.

> tion in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light interferences, or doubtful construction.' *Brown v. Swann,* 10 Pet. 497, 503. . .

Porter v. Warner Holding Co., 328 U.S. 395, 397 (1946).

Thus, "[W]hen congress entrusts to an equity court the enforcement of prohibition in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief tin light of the statutory purposes." *Mitchell v. De Mario Jewelry,* 361 U.S. 288, 292 (1960).

On this basis, this Court has recognized that where a violation of a federally protected right is involved, the courts "must be alert to adjust their remedies so as to grant the necessary relief". *Bell v. Hood,* 327 U.S. 678, 684 (1946).And where racial discrimination is concerned, the courts not only have the discretionary power but "the duty to render a decree which will so far as possible eliminate discriminatory effects of past as well as bar like discrimination in the future. *Louisiana v. United States,* 380 U.S. 145, 154 (1965). Simply put, "the compensation is to be equal to the injury", assuring that "the injured party is placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock,* 6 Wall 94, 99.

Finding that § 1981 "on its face relates primarily to racial discrimination in the making and enforcement of contracts" this Court has observed that "*remedies* available to an individual under Title VII are coextensive with the individual's [sic] right to sue under the provisions of

the Civil Rights Act of 1866, 42 U.S.C. § 1981. . ." (emphasis supplied, citations omitted) *Johnson v. Railway Express Agency, supra,* at 301. Accord, *Carter v. Gallagher,* 452 F.2d 315 (1971), cert denied 406 U.S. 950 (1972). And it is well established that "[I]t is [also] the purpose of Title VII to *make persons whole* for injuries suffered on account of unlawful employment discrimination." (Emphasis supplied) *Albermarle Paper Co. v. Moody,*____U.S.____, 45 L.Ed.2d (280, 297, (1975).

In light of the foregoing, it cannot be again said that in the case *sub judice* the Trial Court fulfilled its obligation to fashion a remedy that provided the necessary relief. *Bell v. Hood, supra.* As mentioned amove, the Trial Court had before it massive oral testimony. Based upon the testimony taken at trial and upon the evidence received, the Court concluded that "rightful place seniority" should be awarded based upon jobs available to the discriminatees both in Houston and in the Southern Conference. "Houston discriminatees' " seniority was based upon over-the-road jobs available at Houston, Texas, and "Southern Conference discriminatees' " seniority was based upon jobs available within the Southern Conference.[19] The Trial Court then ordered that all discriminatees be offered the next available over-the-road jobs, as openings occurred, anywhere within the Southern Conference,[20] and the Court articulated its reasoning.[21] The evidence supported the Court's remedy.[22]

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19. Petition for Certiorari, App. pp. A-34 - A-35.

20. *Id.* pp. A-36 - A-38.

21. *Id.* p. A-39.

22. The Trial Court had abundant testimony upon which it properly concluded that the universe of over-the-road job opportunities

Both the Trial Court and the Court of Appeals heard argument that the Houston terminal was suffering a

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was at least the Southern Conference of Teamsters (composed of eight Southern states).

Mr. Harold Elliott, was called as a witness for the Company and testified as to the procedure followed when he received an application for over-the-road employment during the time that he was operations manager for the Company:

Q. Uh-hum. A. I explained that I would explain the procedure that he would have to foller. I said, to my knowledge, there's no available positions on the road but, first, in all, you will have to resign your position as a city driver if in the event the company does have an opening. This does not mean that you lose your company seniority, but you go on the road at the bottom of the board. I said we can notify Los Angeles and they will make the decision *as to the terminals where there might be a job opening*. (Emphasis supplied) R. p. 1597.

Mr. Coylie Blake, a city driver for the Company, and a Union Steward was called as a witness for the local union and testified on direct examination, as follows:

Q. Now, we've also had testimony, Mr. Blake, relating to statements concerning offers of line jobs in 1968.

Let me ask you if you were ever offered a line job? A. Yes, sir, I was.

Q. Who offered you the line job? A. Well, it come from the higher authority. It come from Mr. Larry Jones out of L.A.

Q. Approximately when was that? A. It was in '68.

Q. And where did the offer take place? A. *These open places, Miami, Oklahoma and St. Louis, I think, and Chicago.* (Emphasis supplied).

Q. Did you accept the offer? A. No, sir, I didn't want it.

Q. Have you had any opportunity since that time? A. Yes, sir, I have.

Q. Have you ever accepted the offer? A. No, sir, I haven't.

Q. First of all, let me ask you, under what conditions was the offer made? That is, what happened to your city seniority, or was that discussed? A. It wasn't discussed because I didn't want the job. R. pp. 1719-1720.

Mr. Cantlay, the President of the Company, testified on direct examination:

Q. Now, you have mentioned under Article 42 that we've been talking about, we have a slightly different situation as to line.

What is the, as you read and interpret the contract, what is the terminal, if I can use that phrase, for seniority purposes of line men

business decline.[23] Considering the "business decline" testimony and to insure that each discriminatee would be made whole, the Court ordered the requisite remedy; a meaningful opportunity in the future that had been denied in the past. The Trial Court fashioned a remedy calculated to place the discriminatees in the positions they would have been but for the Company's hiring discrimination and the Union's lock-in discrimination.

The Petitioners' "but for" question[24] is specious. It is calculated to cause this Court to review the facts upon

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in the Southwest area? A. Well, Southwest has a rather unique seniority roster in line. They, in effect, have two seniority rosters, both of which are modified.

One is a Houston line driver will have a seniority roster that applies to Houston insofar as he's concerned, and he also has a roster for Western Gillette that covers the entire Southwest area. He's on both rosters.

If anything changes in the operation, or layoff, or whatever, that affects that roster, that Southwest roster, the men that are on high seniority have the opportunity to bump, under certain conditions, into any one of these other areas when they can.

Q. Are you telling me that if the man is deciding what run he's going to take, his seniority roster is Houston? He's working out of Houston? A. Yes.

Q. Now, does he have a terminal which is the Southwest area for purposes of deciding where he may work if his seniority is superior to somebody else's, provided he's on layoff and wants to go to other plant's place? A. You'd have to read the conditions and be very specific, but that's correct. The man could, under certain conditions, pick the location where he would perform his line of work and have his seniority placed there with the other men, according to his overall Southwest seniority.

Q. For purposes, then, of the general interpretation of the agreement, when you speak of terminal seniority under a specific contract, you are talking about the work classification that comes under that supplemental contract? A. That's correct.

Q. It may be at a given point or it may be at a combination of places? A. For the line people.
R. pp. 1117-1119.

23. Petition for Certiorari, p. A-66.

24. Petition for Certiorari, p. 3, Question Presented No. 3.

which the Trial Court predicated the remedial portion of its Order. The Court of Appeals carefully examined the remedial aspects of the Trial Court's Order and concluded, "[I]n light of all the circumstances here, we think that this part of the relief ordered by the Trial Court was properly within the statutory discretion and conformed to its responsibility to frame an efficacious remedy". Petition for Certiorari, App. p. A-77. Petitioners do not bring before this Court a substantial question of law, nor a question of law at all; rather they attempt, for the third time, to reargue facts which are not supported by the Record. Respondents submit that certiorari should not be granted for this purpose.

3

The International's Failure to Take Those Precautions Necessary to Assure Equality of Employment Opportunities to its Minority Members Violates 42 U.S.C. §1981

In question 2 of their Petition the International asks whether it may be held liable under 42 U.S.C. §1981 for seniority rules which are incorporated into an alleged locally negotiated collective bargaining agreement. As stated, Petitioners have again made factual assertions which are not supported by the Record. To the contrary the Record supports the Trial Court's finding[25] that the International is significantly involved in negotiating the discriminatory seniority rules of the collective bargaining agreement.[26] The Record additionally supports the proposi-

25. Petition for Certiorari, App. p. A-29.

26. Mr. Lloyd Turner, ex-business representative of Local 988 was called by the Local and asked to explain the negotiation of the

tion that the International exercises significant control

National Master Freight Agreement. On direct examination he testified:

Q. Now, let me see if I—if my understanding of his testimony was correct, that that group of delegates would vote as an entire group on what proposals to submit to management? A. Well, prior to that, each local union had sent in their proposals, as has been testified, and Smith had. Then the International Union, its area conferences, selected their negotiating committees from these, as it's been testified. R. p. 1822.

Q. Well, do I understand you that the ballot—that *a ratification is not done on a local basis?* A. *Well, it is not, no.* No local union does that, or hasn't in the last two contracts.

Q. Do you have any way of knowing how the membership of, say, your local voted on the last contract? A. None whatsoever, no. (Emphasis supplied) R. p. 1827.

Q. If the membership themselves, and that is the membership that are engaged in the trucking industry, had not voted for that authorization, as I understand prior witnesses, you would not be included in the National Freight agreements? A. I would not have had the authority to give the power of attorney to the International Union had our membership not voted such.

The International oversees the activities of the Locals. Mr. W. C. Smith, an organizer employer by the International Union, and called by the International, testified on direct examination:

[A] *The International Union, in order to protect the local unions,* notified them to open their contracts. In addition to this—

Q. Let me put in a paragraph there. You said the International Union *notified* the local unions to open up their contracts, and then it is the local unions that do what? A. Open the contract, notify the employer that they wish to make changes in that contract. The International Union only notifies them as an effort to prevent somebody from—for getting and failing to open the contract. (Emphasis supplied) R. p. 1311.

Q. All right. What happens after that? A. After the contracts are opened, the local union is also *alerted* to post notices or get their membership in the meetings, to take proposals or suggestions for changes in that contract.

They're also *instructed* to make arrangements to have votes taken on power of attorney for the Southern Conference and the International Brotherhood of Teamsters to have authority to bargain in their behalf in the national contract negotiations. (Emphasis supplied). R. pp. 1312-1313.

Q. Now, it is correct, is it not, that without the power of attorney the Southern Conference negotiating committee and the national—

over the Conference and the Local.[27] Moreover, lower Federal Courts facing the identical issue have consistently found that the degree of the International's involvement is sufficient to create liability. See, *e.g., United States v. Navajo Freight Lines, Inc.*, ____F.2d____, 11 FEP Cases 787 (9th Cir. 1975); *United States v. T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), Petition for Certiorari pending; *Johnson v. Ryder Trucklines, supra; Cathey v. Johnson Motor Lines, Inc.*, 398 F. Supp. 1107 (W.D. N.C. 1974); *U.S. v. Pilot Freight Carriers, Inc.*, 54 FRD 519 (M.D. N.C. 1974); *United States v. Lee Way Motor Freight, Inc.*, ____F. Supp.____, 7 EPD ¶9066 (W.D. Okla. 1973); Accord, *Barnett v. W. T. Grant Co.*, ____ F.2d____, 9 EPD ¶10,199 (4th Cir. 1975); and *Myers v. Gilman Paper Corp.*, 392 F. Supp. 413 (S.D. Ga. 1975).

However, Respondents recognize that there appears to be an aberration within the Fifth Circuit with respect to the International's liability. Compare *Herrera v. Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir., 1974), Petition for Certiorari Pending, *sub nom Southern Conference of Teamsters v. Rodriguez*, (No. 75-715) and *Resendis v. Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974) Petition for Certiorari Pending, *sub nom Southern Conference of Teamsters v. Rodriguez* (No. 75-715), with *Sabala v. Western Gillette, Inc.*, 516 F.2d

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however it goes—well, the national cartage et cetera, et cetera, committee has no authority to bargain on behalf of that local union with that particular employer unless it has that power of attorney? Is that correct? A. If the local union would refuse to send in their power of attorney, the conference of the international would be under the assumption that they did not wish to be spoken for on national negotiations.

27. *Id.*

1251 (5th Cir. 1975) and *U.S. v. T.I.M.E.-D.C., supra.* The touchstone for finding the International liable is dependent on a factual showing, at trial, of the International's critical involvement in the negotiating process and its substantial control over the affairs and activities of its affiliated Locals and Conferences. See, e.g., *U.S. v. Navajo Freight Lines, Inc., supra; U.S. v. T.I.M.E.-D.C., supra; Johnson v. Ryder Trucklines, Inc., supra;* and *Cathey v. Johnson Motor Lines, Inc., supra.* In this case, Respondents made the necessary proof. Thus, the inconsistency asserted by Petitioners is nothing more than differing factual determinations within the same Circuit. Respondents submit that this Court is not the proper tribunal for harmonizing differing factual conclusions within the same Circuit.[28]

The International Brotherhood of Teamsters has been acutely aware of the situation that has precipitated this litigation.[29] They have done nothing to rectify the odious consequences of the Agreement;[30] to the contrary they

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28. The Honorable John Miner Wisdom was the architect of the *Sabala* decision as well as the *Rodriguez* trilogy. Presumptively, had there been true inconsistencies, they would have been reconciled.

29. See n. 2, supra.

30. Mr. Donald E. Cantlay, President of the Company has participated in the national negotiations of the discriminatory agreement; he testified on direct examination:

Q. At the time any—any of the time you have been sitting on the negotiating group for the industry in the national contract, can you ever remember a time when the union representatives, for any of the bargaining units that you were involved with, ever made a specific proposal to change the present practices and systems of having seniority treated separately in each contract? A. I don't quite understand what you mean.

Q. My question is whether or not in the negotiations, has there ever been a proposal that would have resulted in a single seniority system for all people or all people in different categories, line and city? A. No, I do not. R. 977-978.

have continued to interpret it in a fashion that locks Respondents and hundreds of thousands of persons similarly situated into city driver positions.[31] At trial, a spokesman for the International Brotherhood of Teamsters suggested that nothing could be done to resolve "the problem".[32] The International misconstrues its affirmative obligation under §1981 to take those steps necessary to eliminate the true cause of the present effects of the Company's discriminatory hiring practices. This acquiescence, inertia and passivity at the negotiating table and elsewhere has operated to deprive Respondents of those very rights which §1981 was enacted to secure. This conduct is in violation of §1981, and the courts have so held. *Myers v. Gilman Paper Corp., supra; Johnson v. Ryder Trucklines, Inc., supra* and *Cathey v. Johnson Motor Lines, Inc., supra.* Accord, *Macklin Spector Freight Systems, Inc., supra.*

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31. The National Master Freight Agreement embraces more than 400,000 truck drivers.

32. On examination by the Court, W. C. Smith, an organizer for the International, testified as follows:

The Court: Well, all you're saying is that where you have situations like Western Gillette where there are a 125 road drivers, two blacks and two Mexican-Americans, and you have city road drivers that would like to move but they don't want to give up their seniority, there's just not anything that can be done? They're just trapped, that's all?

The Witness: My answer would be this, that I don't think that anyone can look at Western Gillette in Houston, Texas, and say, "Here's the problem and here's the answer."

I think that you've got to look at the United States. I think you've got to look at 400,000 people. I think that—

The Court: I don't have jurisdiction over all.

The Witness: I understand that. I do not believe there's a simple answer.

The Witness: *Well, in all courtesy to the Court, I think that the answer is this: There's nothing any of us can do about the last 200 years.* (Emphasis supplied) R. 1341-1342.

Recognizing that "[T]he conclusion is inescapable that . . . Section 1981 and Title VII . . . overlap to the extent of prohibiting union and employer racial discrimination . . ." *Macklin, supra* at 997, the lower Courts properly held the International Brotherhood of Teamsters liable, not only because of their extensive involvement in establishing the discriminatory seniority system, but also because of their informed decision to not remove those "artificial, arbitrary and unnecessary barriers to employment . . . that operate as built-in headwinds for minority groups". *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should, in all respects, be denied.

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